

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RODERICK J. HANKS
Claimant

VS.

SPIRIT AEROSYSTEMS, INC.
Respondent

AND

AMERICAN HOME ASSURANCE CO.
Insurance Carrier

Docket No. **1,046,138**

ORDER

Respondent and its insurance carrier request review of the September 2, 2011 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 18, 2011. The Workers Compensation's Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of former board member Julie A.N. Sample.¹

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

¹ As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Kinch will continue to serve as a Board Member Pro Tem in this case.

The parties agreed claimant suffered work-related injuries to his bilateral upper extremities and stipulated that the date of accident for the series was November 7, 2008. Because claimant remained employed with respondent he only sought compensation for the permanent functional impairment he suffered. But the parties were unable to agree upon the nature and extent of claimant's disability and that was the sole issue for determination by the Administrative Law Judge (ALJ).

The ALJ determined claimant sustained multiple scheduled injuries to his bilateral upper extremities. The ALJ awarded claimant compensation pursuant to K.S.A. 44-510d for a 9 percent functional impairment to the right hand, an 8 percent functional impairment to the right forearm, a 2 percent functional impairment to the right arm, an 18 percent functional impairment to the left hand, an 8.5 percent functional impairment to the left forearm and a 5 percent functional impairment to the left arm.

Respondent requests review of the nature and extent of disability. Respondent argues that claimant should be compensated based upon the ratings provided by the court ordered independent medical examiner.

Claimant argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered injuries to his bilateral upper extremities due to his repetitive drilling and driving rivets performing his job duties for respondent. The parties stipulated to an accident date of November 7, 2008.²

Claimant developed numbness, tingling and pain in both hands. Although the exact time frame of his initial treatment is not clear from the evidentiary record, it appears claimant went to the plant infirmary on November 7, 2008, with complaints of numbness and tingling in his hands, right worse than left. On November 13, 2008, claimant underwent a nerve conduction study and EMG of the upper extremities which was read as normal. Claimant was provided physical therapy and released from treatment on

² The Application for Hearing filed on June 19, 2009, listed "November 2008" as the date of accident.

January 20, 2009.³ But claimant complained that his pain never resolved and his right and left wrist pain worsened with the development of ganglion cysts.

On November 11, 2009, claimant was seen by Dr. Michael Munhall who diagnosed bilateral de Quervain's tenosynovitis and bilateral wrist ganglion cysts. Dr. Munhall recommended further treatment and claimant was referred to Dr. David Hufford.

Dr. Hufford, board certified in family practice, sports medicine and independent medical exams, first saw claimant on January 6, 2010, and provided treatment through April 26, 2010, when claimant was released at maximum medical improvement.

At his initial examination of claimant, Dr. Hufford reviewed the bilateral nerve conduction study and also took a history from claimant. Upon physical examination, Dr. Hufford found claimant had a negative Spurling's test in his neck; no tenderness or evidence of positive rotator cuff signs in his shoulders; and, no dorsal swelling, tenderness or crepitus in claimant's forearms. Claimant did have tenderness at his medial epicondyle on the right and bilateral Tinel's percussion at both elbows. He also had small ganglions about the radial aspect of his wrists. Dr. Hufford noted that claimant did not complain of any problems with either shoulder and Dr. Hufford's examination of claimant did not reveal any positive findings in his shoulders. The doctor diagnosed claimant with bilateral wrist pain with ganglia formation and also medial epicondylitis of the right elbow. Dr. Hufford ordered physical therapy for claimant.

Dr. Hufford noted that the entire time he treated claimant there was no reason the claimant's conditions would prevent him from continuing to perform his job duties. The claimant's conditions that Dr. Hufford treated were bilateral epicondylitis in both elbows, first dorsal compartment tenosynovitis of the forearms and ganglia of the wrists. Dr. Hufford testified that claimant had not complained of any shoulder problems during his treatment.

It should be noted that claimant had filed three workers compensation claims against the respondent. One claim was for a back injury, one was for his left knee and the instant claim for his bilateral upper extremities. Dr. Hufford was providing treatment for both claimant's back and upper extremity complaints. Another doctor was treating claimant for his left knee and claimant underwent arthroscopic surgery for his left knee in February 2010.

After conservative treatment failed to completely resolve claimant's upper extremity complaints, Dr. Hufford discussed the option of surgery with the claimant. Because the pain was not bad enough the claimant was not willing to consider surgery, and Dr. Hufford concluded there were no further conservative measures to undertake. Consequently, Dr.

³ Murati Depo., Ex. 5.

Hufford determined claimant was at maximum medical improvement and he was released from care on April 26, 2010.

Based on the *AMA Guides*⁴, Dr. Hufford gave claimant a 2 percent impairment for his left arm at the medial epicondyle; a 2 percent impairment for his lateral epicondylitis of the left elbow; and, a 2 percent impairment for the tenosynovitis in the flexor structures of the left forearm. These left upper extremity impairments combine for a 6 percent. For the medial epicondylitis of the right elbow and for the flexor tenosynovitis in the right forearm, claimant received a 2 percent impairment for the elbow and forearm. These impairments combine for a 4 percent right upper extremity impairment.

Dr. Hufford reviewed claimant's nerve conduction study that was performed on January 6, 2011, and he opined that the study was normal. Dr. Hufford testified that the nerve conduction study confirmed claimant did not have cubital or carpal tunnel syndrome. On cross examination, Dr. Hufford testified that his care was limited to claimant's elbows and wrists because those conditions were symptomatic. And that he did not recall claimant making any complaints of numbness or tingling in the fingers.

At the request of claimant's attorney, Dr. Pedro Murati examined claimant on June 16, 2010. The doctor is board certified in physical medicine and rehabilitation as well as an independent medical examiner. Dr. Murati reviewed claimant's medical records and personal history. Claimant presented with complaints that he frequently dropped objects from his hands, had numbness and tingling with pain in both hands and his fingers would bend upwards.

After conducting a physical examination of claimant, the doctor diagnosed him with bilateral carpal tunnel syndrome; bilateral de Quervain syndrome; tenosynovitis of the left first, second and third digits and the right first digit; left medial and lateral epicondylitis; and, right rotator cuff tear versus strain. Dr. Murati opined that claimant's current diagnoses are all within reasonable medical probability a direct result from his work-related injuries in November 2008. Instead of imposing specific restrictions Dr. Murati advised claimant to use common sense and work as tolerated.

Based upon the *AMA Guides*, the doctor concluded claimant had the following right upper extremity impairments: (1) a 3 percent to right thumb due to loss of range of motion; (2) a 40 percent to right first digit due to tenosynovitis; (3) a 10 percent to right upper extremity for carpal tunnel syndrome; (4) a 6 percent to the right wrist due to crepitus; and, (5) a 9 percent to the right shoulder due to loss of range of motion. These right upper extremity impairments combine for a 30 percent.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

Also, claimant had the following left upper extremity impairments: (1) a 6 percent to right thumb due to loss of range of motion; (2) a 40 percent to right first digit due to snapping tenosynovitis; (3) a 20 percent to the right second digit due to the tender flexor nodule; a 20 percent to the left third digit due to the tender flexor nodule; (4) a 10 percent to left upper extremity for carpal tunnel syndrome; (5) a 6 percent to the left wrist due to crepitus; (6) a 3 percent to left upper extremity for left medial epicondylitis; and, (7) a 3 percent to left upper extremity for the left lateral epicondylitis. These left upper extremity impairments combine for a 32 percent.

Dr. Murati testified that his permanent impairment ratings did not change after he reviewed Dr. Stein's notes, the most recent nerve conduction study and EMG. And Dr. Murati explained that he did not rate the right elbow because at examination there was no tenderness in the right elbow.

On cross examination, Dr. Murati agreed that even though claimant only complained of problems with his hands and fingers the doctor also made findings and rated claimant's left elbow and right shoulder. And Dr. Murati testified that none of his impairment ratings are related to ganglion cysts. Finally, Dr. Murati disagreed with the normal findings that Dr. Schwertfeger made on the January 6, 2011, nerve conduction study.

On October 18, 2010, the ALJ ordered an independent medical examination of claimant by Dr. Paul Stein to determine ratings and restrictions, if any, due to his accidental injury in November 2008. On November 19, 2010, Dr. Stein conducted the court ordered medical evaluation of claimant. The doctor reviewed claimant's medical records and took a history from claimant. Claimant complained of bilateral wrist pain extending up the forearm to the back of each elbow. He also complained of numbness and tingling in both hands, worse on the left, and difficulty holding on to objects for long periods of time. The claimant did not make any complaints of problems with either shoulder.

Dr. Stein performed a physical examination of claimant and found claimant had tenderness to palpation over the lateral epicondyles of both elbows, more on the left than the right. Range of motion was intact for the hands and elbows with no crepitus at either the elbows or wrists. Claimant was diagnosed with cumulative trauma syndrome to both upper extremities which resulted in bilateral de Quervain's tenosynovitis causing pain at the base of his thumbs. He also had bilateral epicondylitis (tennis elbow) as well as complaints consistent with carpal tunnel syndrome. But the nerve conduction test performed in 2008 was negative.

Because claimant did not want surgical intervention or steroid injections Dr. Stein concluded claimant had reached maximum medical improvement. Based on the AMA Guides, Dr. Stein rated claimant's right wrist at an 8 percent impairment due to decreased range of motion and the left wrist was given an 9 percent impairment due to decreased range of motion. Dr. Stein did not provide permanent impairment ratings for claimant's bilateral elbows because the range of motion was normal and except for some tenderness

at the elbows the function of the of the elbows was normal and the lateral epicondylitis, if present, was not impairing the function.

The doctor recommended a nerve conduction test to see if claimant's carpal tunnel complaints had progressed any since the nerve conduction test that was negative in 2008. Dr. Stein provided permanent work restrictions for claimant's upper extremities of no frequent repetitive activities, no riveting, no use of vibratory or impacting tools and no crimping allowed.

Dr. Stein reviewed the January 6, 2011, EMG/nerve conduction study, which he opined was normal, and therefore he did not rate claimant for carpal tunnel syndrome.

On cross examination, Dr. Stein agreed claimant complained of numbness, tingling or pain in both hands. And Dr. Stein testified that claimant's discomfort/pain in his elbows could wax and wane depending on his activities.

At the time of the regular hearing, claimant had been released from treatment but he testified he was still having problems with both thumbs, fingers, both wrists, elbows and shoulders. Claimant had pain, numbness and tingling in his thumbs, fingers and wrists. But claimant testified that respondent made job accommodations so that he can continue to work.

It should be noted that when an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.⁵ As claimant continues to work for respondent that presumption is rebutted.

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must make the ultimate decision as to the nature and extent of injury. And the Board is not bound by the medical evidence presented but must adjust the medical

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁶

In this case the treating physician, Dr. Hufford concluded claimant had suffered a permanent impairment to his bilateral forearms and elbows. The claimant's medical expert, Dr. Murati, concluded claimant had suffered permanent impairment to three fingers on his left hand, two fingers on his right hand, bilateral wrists due to carpal tunnel syndrome, his left elbow and right shoulder. Because of the variance of opinions, the ALJ ordered an independent medical examination to be performed by Dr. Stein who concluded claimant suffered permanent impairment to his bilateral wrists.

All of the doctors testified that claimant never made shoulder complaints either during treatment with Dr. Hufford or upon examination by either Drs. Stein or Murati. Consequently, the Board affirms the ALJ's determination claimant failed to sustain his burden of proof that he suffered permanent impairment to his shoulders.

Claimant's hand and finger complaints were indicative of carpal tunnel syndrome. Dr. Stein recommended additional studies but the nerve conduction/EMG studies in 2011 were normal which ruled out carpal tunnel syndrome. Consequently, Dr. Stein did not provide a rating for the carpal tunnel syndrome. And Dr. Stein found no basis for a permanent rating to the digits of the hands which he determined had full range of motion. Moreover, none of the doctors concluded claimant had a permanent impairment to the hands. The Board finds Dr. Stein's opinion more persuasive in this instance and finds claimant did not suffer any permanent impairment to his hands or fingers.

As previously noted, Dr. Stein rated claimant's right wrist at an 8 percent impairment due to decreased range of motion and the left wrist was given a 9 percent impairment due to decreased range of motion. Although Dr. Murati also provided ratings for claimant's wrists, he relied upon a carpal tunnel diagnosis which the nerve conduction/EMG studies refuted. The Board finds Dr. Stein's opinion more persuasive and adopts his ratings. Because the ratings were to claimant's wrists he is entitled to compensation calculated for loss of use of the forearms.⁷

Dr. Hufford concluded claimant had suffered permanent impairment to both elbows. Dr. Murati opined claimant had suffered permanent impairment to the left elbow and Dr. Stein concluded claimant did not suffer any permanent impairment to either elbow. But all the doctors noted claimant had tenderness in his left elbow upon examination and suffered from epicondylitis. Dr. Stein agreed that the elbow symptoms could wax and wane and

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁷ See, K.A.R. 51-7-8(b)(4).

claimant complained that he still had pain. In this instance the Board finds that claimant has met his burden of proof to establish that he suffered permanent impairment to his left elbow. Dr. Hufford's opinion is more persuasive and the Board finds claimant is entitled to compensation for a 4 percent permanent partial impairment to his left elbow. Because the permanent impairment is to the elbow the compensation will be calculated for loss of use of the left arm.⁸

In summary, the ALJ's award is modified to reflect claimant has met his burden of proof to establish that he is entitled to compensation for an 8 percent impairment to his right forearm, a 9 percent impairment to his left forearm and a 4 percent impairment to his left arm.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 2, 2011, is modified to reflect claimant has met his burden of proof to establish that he is entitled to compensation for an 8 percent permanent partial impairment to his right forearm, a 9 percent permanent partial impairment to his left forearm and a 4 percent permanent partial impairment to his left arm.

Right Forearm

Claimant is entitled to 16 weeks of permanent partial disability compensation, at the rate of \$529 per week, in the amount of \$8,464 for an 8 percent loss of use of the right forearm, making a total award of \$8,464.

Left Forearm

Claimant is entitled to 18 weeks of permanent partial disability compensation, at the rate of \$529 per week, in the amount of \$9,522 for a 9 percent loss of use of the left forearm, making a total award of \$9,522.

⁸ Id.

⁹ K.S.A. 2010 Supp. 44-555c(k).

Left Arm

Claimant is entitled to 8.40 weeks of permanent partial disability compensation, at the rate of \$529 per week, in the amount of \$4,443.60 for a 4 percent loss of use of the left arm, making a total award of \$4,443.60.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge